

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP727

Cir. Ct. No. 2009CV471

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DOUGLAS V. ERDMAN,

PLAINTIFF-RESPONDENT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Reversed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. The Department of Transportation (DOT) appeals a judgment entered in favor of Erdman for the amount of damages he sustained as result of a road improvement project by the DOT that reduced his access between his parcel of property and a state highway. The judgment was entered subsequent

to an order of summary judgment by the circuit court on the issue of whether a compensable taking occurred as a result of the improvement project. The DOT argues that the circuit court erred in granting summary judgment to Erdman on that issue. We agree and therefore reverse the judgment and order of summary judgment.

BACKGROUND

¶2 Erdman is the owner of a parcel of land which is located at the southwest corner of the intersection of State Highway 26 and Banker Road in the Town of Jefferson. The property is used primarily for trucking and warehousing purposes. Erdman took title to the property in 1997 or 1998. Prior to 1994, the property later acquired by Erdman enjoyed direct access to Highway 26. However, in 1994 Highway 26 was improved and as part of that improvement project, Erdman's predecessor in interest conveyed to the DOT in fee simple 2.70 acres of land and all rights to direct access from the property to Highway 26. Following the conveyance of access rights to Highway 26, Highway 26 was accessed from the property via Banker Road.

¶3 Sometime after 2007, the DOT began implementing plans to construct an overpass on Highway 26 over Banker Road and to terminate access to Highway 26 from Banker Road. A consequence of the DOT's plans was the elimination of the ability to access Highway 26 from Erdman's property via Banker Road.

¶4 In May 2009, Erdman filed a verified petition for inverse condemnation under WIS. STAT. § 32.10 (2011-12).¹ Erdman alleged that the improvements to Highway 26, would “terminate [his] adequate, reasonable and convenient access to and from [Highway] 26” and would “deny [him] all the beneficial use of the [p]roperty.” Erdman moved the circuit court for summary judgment on the issue of whether the DOT had taken his property rights without just compensation, and he requested an order commencing condemnation proceedings. The circuit court granted Erdman’s motion. The court concluded that Erdman “ha[d] an interest in access [to Highway 26] and that there ha[d] been a taking under the statute.” The court further concluded that inverse condemnation procedures applied and ordered that the case proceed for a determination of the amount of just compensation Erdman was entitled.

¶5 The DOT moved the circuit court for reconsideration. The court issued a “Supplementary Decision” in response, wherein the court “confirm[ed]” its earlier summary judgment decision. The issue of just compensation was tried before a jury. In a special verdict, the jury found that the fair market value of Erdman’s property on August 15, 2008, was \$1,157,000 and, assuming that the road construction project at the intersection of Highway 26 and Banker Road was completed on August 15, 2008, the jury found that the fair market value of the

¹ “WISCONSIN STAT. § 32.10 authorizes inverse condemnation proceedings by a landowner whose property ‘has been occupied by a person possessing the power of condemnation.’” *Hoops Enters., III, LLC v. Super Western, Inc.*, 2013 WI App 7, ¶10, 345 Wis. 2d 733, 827 N.W.2d 120 (quoting WIS. STAT. § 32.10).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

property after August 15 was \$671,060. Judgment was subsequently entered in favor of Erdman. DOT appeals.²

¶6 We reference additional facts as necessary to our discussion below.

DISCUSSION

¶7 The DOT contends the circuit court erred in its decision to grant summary judgment in favor of Erdman on the issue of whether a compensable taking occurred in this case. We review summary judgment de novo. *Pinter v. American Family Mut. Ins. Co.*, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when no material factual dispute exists and the moving party is entitled to judgment as a matter of law. *Id.*; WIS. STAT. § 802.08(2).

¶8 The law is clear that private property may “not ‘be taken for public use, without just compensation.’” *260 North 12th Street, LLC v. DOT*, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372 (quoted source omitted). *See also* WIS. CONST. art. I, §13 (“[t]he property of no person shall be taken for public use without just compensation”). WISCONSIN STAT. § 32.10 authorizes a landowner “who believes that his or her property has been taken by the government without instituting formal condemnation proceedings, to commence an action to recover just compensation for the taking.” *Sippel v. City of St. Francis*, 164 Wis. 2d 527, 534-35, 476 N.W.2d 579 (Ct. App. 1991). Section 32.10 provides:

² Prior to trial, this case was overseen by Judge Jacqueline Erwin, who issued the order of summary judgment at issue in this appeal. In January 2011, this case was reassigned to Judge William Hue, who presided over the trial on the issue of just compensation and who issued the judgment from which the DOT appeals.

If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced.... The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter ... assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

¶9 The supreme court has explained that “[b]y its terms, [WIS. STAT.] § 32.10 ‘is designed solely to deal with the traditional exercise of eminent domain by the government,’” whereby “‘the government has occupied private property, plans to continue such occupation and the landowner is merely requesting just payment for [the] land.’” *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶36, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting *Zinn v. State*, 112 Wis. 2d 417, 433, 334 N.W.2d 67 (1983)).

¶10 The supreme court in *Howell Plaza, Inc. v. State Highway Comm.*, 66 Wis. 2d 720, 730, 226 N.W.2d 185 (1975) (*Howell I*), held that absent actual possession, “the facts alleged must ‘show that the property owner has been deprived of all, or practically all, of the beneficial use of his [or her] property or of any part thereof’” in order to state a claim under WIS. STAT. § 32.10. *E-L Enters., Inc.*, 326 Wis. 2d 82, ¶37 (quoting *Howell I*). The supreme court later clarified in *Howell Plaza, Inc. v. State Highway Comm.*, 92 Wis. 2d 74, 81-2, 87-89, 284 N.W.2d 887 (1979) (*Howell II*), that “short of actual occupation, there must be a legal restraint by the condemning authority that deprives the owner of all, or substantially all, of the beneficial use of his [or her] property.” *E-L Enters., Inc.*, 326 Wis. 2d 82, ¶37. Thus,

in order to state a claim of inverse condemnation under § 32.10, the facts alleged must show either that there was an actual physical occupation by the condemning authority or that a government-imposed restriction deprived the owner of all, or substantially all, of the beneficial use of his [or her] property.

Id.

¶11 Erdman claims that the “DOT ‘occupied’ ... [his] [p]roperty’s access to and from [Highway] 26 when it eliminated access via Banker Road.” He further argues that it “occupied” his access rights “when it engaged in a two-stage action to eliminate access to and from [Highway] 26.” The first stage occurring in 1994 when the DOT purchased in fee simple a portion of Erdman’s predecessor in interest’s land and all direct access rights from the property to Highway 26. The second stage being the present improvement project.

¶12 While Erdman’s two-stage-elimination-of-access argument might have some appeal if the law on this topic were different, we are constrained by the law we have. Erdman points to no authority supporting the proposition that we may consider the 1994 project and its interaction with the current improvement project. Accordingly, we focus, as we must, on the DOT’s current improvement project to Highway 26 and whether that project, when completed, would have a compensable effect on Erdman’s property.

¶13 The supreme court has stated that, in order for an owner to obtain just compensation, the occupation by the DOT must be an “actual physical occupation.” ***Id.*** Erdman has not presented any facts, nor cited us to any case law, upon which a court could conclude as a matter of law that the DOT *physically occupied* any part of Erdman’s property as part of the present improvement project to Highway 26. Accordingly, we turn to the test that does apply here. To

establish a claim under WIS. STAT. § 32.10, it was Erdman’s burden to set forth facts which would establish that the “government-imposed restriction,” in this case the improvement to Highway 26 which terminated Banker Road’s direct access to Highway 26, “deprived [Erdman] of all, or substantially all, of the beneficial use of his property.” *Id.*

¶14 We have reviewed the summary judgment submissions in this case and there are no facts in those submissions to suggest that Erdman’s loss of access to Highway 26 via Banker Road will deprive him of all, or substantially all, the beneficial use of his property. *See id.* For that matter, we observe that this factual conclusion proved to be in keeping with the evidence adduced at trial. Accordingly, we reverse the order of summary judgment in Erdman’s favor, and the money judgment subsequently entered.

CONCLUSION

¶15 For the reasons discussed above, we reverse.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

